Date: July 14, 1997

Case No.: 95-INA-359

In the Matter of:

GOLDEN GOOSE PUB,
Employer

On Behalf Of:

JOSE J. MORALES,
Alien

Appearance: John Stephen Glaser, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On November 5, 1993, Golden Goose Pub ("Employer") filed an application for labor certification to enable Jose Juan Morales ("Alien") to fill the position of Seafood Specialty Night Chef (AF 22-23). The job duties for the position are:

> Oversee kitchen personnel who prepares, cooks and serves various seafood specialties. Daily preparation of scallops, red snapper, clams, calamari, halibut, salmon, cioppino, lobster, squid, shrimp, oysters, sole, sea base, sandabs & swordfish dishes. Maintain kitchen inventory. Order foodstuff and requisition supplies. Train new cooks.

The only requirement for the position is two years of experience in the job offered or three years of experience as a Seafood Specialties Cook. The Employer noted that verifiable references are required under Other Special Requirements.

The CO issued a Notice of Findings on August 23, 1994 (AF 17-20), proposing to deny certification. The CO determined that the Employer failed to adequately recruit U.S. workers in violation of 20 C.F.R. § 656.21(b)(1) and § 656.21(g) by advertising the offered position in the *Daily Breeze* instead of the *Los Angeles Times* (city edition). The CO also determined that the Employer has failed to offer its actual minimum requirements for the job in violation of 20 C.F.R. § 656.21(b)(5). The CO noted that the Employer's requirement of two years of experience in the job offered or three years of experience as a Seafood Specialties Cook does not appear to meet the true minimum requirements in that when the Alien was hired, he did not meet the requirement and was trained and/or provided the "necessary learning opportunities" after his hire. The CO stated that the position of Seafood Specialties Cook, which was the position held by the Alien, is considered as a trainee, apprenticeship, or helper position "leading or evolving into the position for which you are seeking a labor certification;" therefore, this training must be offered to U.S. workers as well or it cannot be required of U.S. applicants.

Accordingly, the Employer was notified that it had until September 27, 1994, to rebut the findings or to cure the defects noted.

In its rebuttal, dated September 23, 1994 (AF 10-16), the Employer contended that it acted properly by advertising for the position in the *Daily Breeze* newspaper as opposed to the *Los Angeles Times*, as it is a newspaper of general circulation in the area of consideration

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

(Torrance, California) and, in fact, has a greater circulation in that area than the *Los Angeles Times* during the week, which is when the advertisement ran. Additionally, the Employer contended that the CO's statement that there were no respondents to the advertisement is incorrect as there was one U.S. applicant, Tim C. Burnham, who responded to the advertisement but was found unqualified for the position. In response to the CO's finding that the Employer has not offered its true minimum requirements for the job, the Employer stated that the Alien's previous position is dissimilar from the offered position and it is not used as a training position. The Employer stated that, "[t]he alien independently demonstrated the ability to perform in the job for which labor certification is sought."

The CO issued the Final Determination on October 19, 1994 (AF 8-9), denying certification because: (1) the Employer has failed to adequately test the labor market; and, (2) the Employer has failed to state its actual minimum requirements for the offered position.

On November 11, 1994, the Employer requested review of the Denial of Labor Certification (AF 1-7). In March 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.21(b)(5) addresses the situation of an employer requiring more stringent qualifications of U.S. workers than it requires of the alien. Specifically, § 656.21(b)(5) provides:

> The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

The CO in this case found that the Employer's requirement of two years of experience in the job offered or three years of experience as a seafood specialties cook did not appear to meet the true minimum requirements for the job offered (AF 19). Specifically, the CO found that the Alien, at the time of his hire, did not meet the experience requirements and was trained after he was hired. The CO further found that the position of Seafood Specialties Cook was a trainee or helper position leading into the job opportunity. As such, the Employer was instructed to delete or alter the requirement and readvertise or show why it is not feasible to hire an individual with less than the requirement or show that the Alien obtained the required experience or training elsewhere (AF 19-20). The CO further instructed that, if the Employer chose to retain the requirement, it must provide substantial documentation that it is not now feasible to hire anyone with less experience than the requirement or it must show that the occupation in which the Alien was hired is dissimilar from the occupation for which labor certification is sought (AF 20).

In rebuttal, the Employer chose to show why it is not feasible to hire anyone with less than the requirement (AF 12). In a brief letter, the Employer stated that it does not use the seafood

specialties cook position as a training position for the more demanding position of Night Chef (AF 14). The Employer further stated,

> in order to become a chef, an applicant would need to independently demonstrate great talent in the preparation and cooking of seafood and in overseeing kitchen personnel who prepare, cook and serve the food. The cook and chef positions are dissimilar positions in that there are great differences in the responsibility levels. The chef must oversee kitchen personnel, order food stuff and requisition supplies. While the cook simply prepares and cooks the food.

The Employer stated that it is in need of chefs who can prepare and cook many different kinds of seafood. Finally, the Employer stated that "it is not feasible to hire someone with less than 2 years of experience in the job or 3 years as seafood specialty cook."

The factual findings of the Certifying Officer generally are affirmed if they are supported by substantial evidence in the record as a whole. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474 (1951); *Consolidated Edison Co. v. Labor Board,* 305 U.S. 197, 229 (1938). In the instant case, the CO made a factual finding that the Employer had not established that the job opportunity is sufficiently dissimilar and/or that it is not feasible to hire an individual with less than the listed requirements. Thus, it must be determined whether that conclusion is a reasonable inference from this record.

We emphasize that the burden of proof rests with the Employer. In this case, the Employer has only offered conclusory statements in support of its position. For example, the Employer stated that "the cook position has never been used, and was not used in this case, as a training position." Likewise, the Employer merely stated that "it is not feasible to hire someone with less than 2 years of experience in the job or 3 years as seafood specialty cook." Although a written assertion constitutes documentation that must be considered under *Gencorp,* 87-INA-659 (Jan. 13, 1987) (*en banc)*, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof.

Accordingly, we find that the CO's conclusion, that the Employer has not established that its requirements for the job represent the actual minimum requirements, is reasonable and is supported by substantial evidence in the record as a whole. As such, the CO's denial of labor certification will be AFFIRMED.[2]

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

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[2] Based on the foregoing, we find it unnecessary to discuss the other basis for the CO's denial of labor certification.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.